JD(SF)-66-06
Everett, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

DURHAM SCHOOL SERVICES, L.P.

Employer

and **19-RC-14842**

TEAMSTERS LOCAL UNION NO. 38,
affiliated with INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

Keith A. Sharp, Esq., for Falk & Sharp, of Pasadena, California, appearing on behalf of the Employer

Terry Jensen, Esq., for Rinehard & Robblee, P.L.L.P., of Seattle, WA, appearing on behalf of the Petitioner

REPORT ON OBJECTIONS

BURTON LITVACK: ADMINISTRATIVE LAW JUDGE

Statement of the Case

Seeking to become the representative for purposes of collective bargaining of all full-time and regular part-time school bus drivers and mechanics employed by Durham School Services, L.P., herein called the Employer, in Everett, Washington, Teamsters Local Union No. 38, affiliated with International Brotherhood of Teamsters, herein called the Petitioner, filed the above-captioned petition for representation election with Region 19 of the National Labor Relations Board, herein called the Board, on May 4, 2006.[1] Thereafter, pursuant to a Decision and Direction of Election, issued by the Regional Director of Region19 on May 23, an election, by secret ballot, was conducted by an agent of Region 19 on June 16 in a unit of all full-time and regular part-time school bus

[1] Unless otherwise stated, all events herein occurred during calendar year 2006.

drivers employed by the Employer at its Everett, Washington facility; excluding all office clerical employees, dispatchers, managerial employees, mechanics, guards, and supervisors as defined by the National Labor Relations Act, herein called the Act. The tally of ballots established that 43 votes were cast for the Petitioner and 52 votes were cast against Petitioner and that six ballots were challenged.[2] Thereafter, on June 23, the Petitioner timely filed objections to the conduct of the election, and, on July 20, the Regional Director issued a report, finding that, as they raised substantial and material issues of law and fact, certain of the Petitioner's objections should be resolved at a hearing. Pursuant to the Regional Director's accompanying order, a hearing on the objections[3] was held before the above-named administrative law judge in Seattle, Washington on August 23 and 24. At the hearing, each party was afforded the opportunity to call witnesses on its behalf, to cross-examine all witnesses called by the other party, to offer into the record all relevant documentary evidence, to orally argue legal points, and to file post-hearing briefs. Said briefs were filed by the attorney for each party, and both briefs have been carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observation of the testimonial demeanor of the several witnesses, I issue the following report on objections.

Objection No. 3-- In the several days leading up to the May 15 hearing in the above-captioned case, the Employer interfered with unit employees' rights and obligations to testify pursuant to NLRB subpoenas issued by the Union.

Pursuant to successive five-year contracts with Everett Public Schools, herein called the School District, the Employer, which provides school bus services for, at least, 36 public school districts in the western United States, has provided school bus services in the city of Everett, Washington since 1981. At its Everett service facility, which includes executive offices, a dispatch office, a lunch room, and an attached garage and repair area, the Employer employs approximately 100 school bus drivers, mechanics, and other employees. Kirk Tostenrude has been the Employer's general manager at its Everett, Washington facility since March 20, and Stacy Kloster is the Employer's operations manager at said location. The Petitioner filed its representation petition in the above-captioned matter on May 4, and Region 19 scheduled a representation case hearing in the matter for Monday, May 15. In preparation for the pre-election hearing, the Petitioner obtained subpoenas from the Region and issued six of them to Everett employees, including Laura Montano, Colleen Martin, and Dawn Pearce, in order to ensure the appearance of each at the hearing for possible testimony. Montano, Martin, and Pearce received their subpoenas on the Wednesday of the week prior to the hearing, and each gave a copy of her subpoena to Kloster.

[2] The number of challenged ballots was insufficient to affect the results of the election.

[3] Petitioner originally filed 15 objections to the conduct of the election. Prior to and at the hearing, counsel for Petitioner withdrew objections numbered 1, 2, 4, 5, 6,11, 13, and 14. Therefore, the hearing and my report concern the Petitioner's objections numbered 3, 7, 8, 9, 10, and 12.

Martin testified that, on the morning of Friday, May 12, she was in Kloster's office for another matter and, as she was leaving, asked Kloster for time off to attend the hearing and that Kloster replied that she did not know and questioned the legality of Martin's subpoena. That afternoon, according to Martin, Kloster telephoned her at approximately 4:50, and "… she told me to report for work Monday morning and … if they needed me, for court … they would cover my route and they would call me and let me know." Martin further testified that, on Monday morning, at approximately 6:00, Kloster telephoned her and "… told me that I … had to stay at work … until I was called to court."[4] Montano initially testified that Kloster left a voice mail message on her cellular telephone on the Friday afternoon prior to the scheduled representation case hearing. Kloster said "… that she received a call from a lawyer saying that it was not necessary for me to attend the hearing on Monday; to report to work; and , if they needed me, they would give me a call, either Monday afternoon or Tuesday morning." Immediately upon hearing the message, Montano telephoned Leonard Kelley, an organizer/business representative for the Petitioner, and asked him if he knew about what Kloster had said, "… and he told me that he did not." Upon being shown a statement, which she gave to the Petitioner on or about June 13, Montano also recalled that Kelley instructed her to return Kloster's telephone call and to ask the Employer's official two questions-- "…if she was asking me to ignore the subpoena and, if I went, what would happen." Thereupon, Montano telephoned Kloster, "… and … I asked her … if she wanted me to ignore the subpoena and she said, no, that the lawyers would call me if they needed me." Then, Montano asked what consequences were there if she honored the subpoena. Kloster said she did not know, "… and she asked why would I go if they told me not to go…. I said … because I was subpoenaed." On Monday morning, the day of the hearing, the Everett facility dispatcher asked her to telephone Kloster, and, at approximately 7:45 in the morning, Montano did so. "She told me that I was to stay at work unless I heard from the lawyer and, if they needed me … I would be going that afternoon but to stay at work until I received a phone call from [Leonard Kelley]." Montano said she asked no questions of Kloster.[5]

Dawn Pearce testified that she also received a telephone call from Kloster on Friday night. Kloster "… said that they had just got done talking to the attorneys and that, at this time, they did not need me to go to the hearing and … I said okay, and … are you positive because I had not heard anything from [the Union]. She said, yes … we have just gotten off of the phone … with the attorneys." After speaking to Kloster, because her husband was worried about adverse consequences if she did not comply

[4] Martin knew of no conversations between individuals, who had been subpoenaed for the hearing, and other employees with regard to Kloster's instructions to the subpoenaed bus drivers, and she conceded that Kloster never said she would not be permitted to testify at the hearing.

[5] On redirect examination, counsel for the Petitioner asked Montano if she discussed Kloster's comments with other employees, and she answered, "Yes." However, I did not permit counsel to continue this line of questioning as counsel for the Employer did not raise it during cross-examination and the question was obviously not meant as rehabilitation. In these circumstances, I will not consider Pearce's response to counsel's question as a fact.

with the subpoena, Pearce telephoned Leonard Kelley, and the latter "… said … he had no knowledge of any attorney's conversations or possible cancellations." Then, according to Pearce, early on Monday morning, the day of the hearing, Kelley telephoned her "… and told me that I did need to go, that he had talked to their attorney and I did need to go." While on her way to work, Pearce telephoned Kloster, "…and I told her that she was correct, that somebody [had called] me and told me that I needed to go and she told me to go ahead and proceed to my bus and that she would call me back." Upon arriving at Employer's Everett facility, Pearce was told to telephone Kloster and did so. "She told me that was incorrect. I did not have to come to court and, after my route, to call Leonard to see if there had been any changes." Pearce further testified that she completed her morning bus route and telephoned Kelley, who told her to come to the hearing. Later, in the presence of another driver, Elaine Hancock,[6] who "heard" the conversation,[7] Pearce telephoned Kloster[8] and told the latter she had been instructed to come to the hearing, and Kloster replied that Pearce's information was incorrect and "I did not need to come." Continuing, Pearce said "[Stacy] was telling me that they did not want to have to cover that many routes and that is why the attorneys were having us all come down."[9]

Petitioner's attorney, Terry Jensen, testified that he was aware the Petitioner had subpoenaed several of the Employer's Everett bus drivers to testify at the hearing on May 15 and that, on Thursday, May 11, he received a telephone call from the Employer's attorney, Keith Sharpe, who informed him that the company was "tight on drivers to get the work done" and asked Jensen to get back to him. The next day, Jensen learned that the Employer had filed a motion with Region 19 to quash the subpoenas to the bus drivers and telephoned Sharp, who was not in the office. At approximately noontime, Jensen left his office for his home in order to prepare for the hearing on Monday, and, at approximately 4:45 p.m., he received a telephone call from a Seattle attorney, Mark Marshall, who informed Jensen he had been retained to act as the Employer's attorney at the Monday hearing. Marshall said that he wanted to make arrangements to release the subpoenaed witnesses on a staggered basis so that the Employer could cover their work. Jensen asked what issues would be raised at the hearing and said he could make no arrangements regarding the staggering of witnesses until he knew the possible issues. Marshall replied that, as he had not yet spoken to the Employer's officials, he did not know what issues would be raised at the hearing. Upon ending his conversation with Marshall, Jensen telephoned Leonard Kelley, who was the Petitioner's agent responsible for the organizing campaign amongst the Employer's Everett employees, and reported his conversation with Marshall, and they decided nothing should be done about witnesses until they had more information. On Saturday,

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[6] Pearce testified that she had previously informed Hancock as to her prior conversations with Kloster and Kelley "because I was getting kind of nervous."

[7] Hancock was a witness at the hearing but was not asked any questions in order to corroborate Pearce.

[8] Pearce telephoned Kloster on her cellular phone and turned the volume to a high level.

[9] Everett is a suburb of Seattle and is approximately 26 miles from downtown Seattle.

Jensen telephoned Marshall after 12:00 p.m., and Marshall identified two issues, which would be raised at the hearing-- whether the voting unit should include mechanics and the date for the election. Marshall raised the matter of scheduling the witnesses, and Jensen told him he would have to speak with Kelley. According to Jensen, he did not speak to Kelley until Sunday night, and Kelley's position remained that all witnesses would have to appear and testify. However, Jensen further testified, he again spoke to Kelley shortly after 6:00 on Monday morning, and the latter said he had decided to release three employees from their subpoenas. Thereupon, Jensen immediately telephoned Marshall and informed him of Kelley's decision. During cross-examination, Jensen conceded that, at the representation hearing, he never said that the Petitioner desired to call additional witnesses who were not present at the hearing and not permitted to be there and that the Petitioner was not prejudiced in putting on its case at the hearing.

Attorney Mark Marshall essentially corroborated Jensen, testifying that he did not become involved in the instant matter until the Friday before the representation hearing, that he did not speak to Jensen until that evening, that he did not become familiar with the Employer's issues until Saturday, and that, on Saturday, he informed Jensen of the issues, raised the necessity of staggering witnesses, and was told by Jensen he needed to speak to Kelley about that matter. Marshall further testified that, early on Monday morning, Stacy Kloster telephoned him and said that a group of drivers wanted to leave immediately to be at the hearing on time but that such would "upset the bus schedules." Thereafter, according to Marshall, he had two subsequent telephone conversations with Jensen with the result being an agreement that "some" drivers would have to appear at the start of the hearing; "… if others were necessary, they could be called during the morning or during the day and would be scheduled … for that afternoon …;" and these witnesses would be released upon a telephone call if required to testify. Further, Marshall recalled, he "probably" communicated with his client the agreement that some of the Petitioner's witnesses would be staggered or not needed.

Henry Leonard Kelley testified that he was the Petitioner's organizer/business representative, who was assigned to the organizing campaign amongst the Employer's Everett, Washington employees and that he served subpoenas on six of the bus drivers to testify at the representation hearing scheduled for May 15. According to him, he telephoned Dawn Pearce, Laura Montano, and Colleen Martin early ("sometime after 5:00 in the morning") on the day of the hearing and released each one from her subpoena.[10] Notwithstanding having previously told each woman she was required to appear and testify pursuant to the subpoena, he ultimately released the three as a result of a Sunday night telephone call from another bus driver for the Employer. The latter

[10] Asked, by me, what he told each employee, Kelley said, "The first conversation when I released them, I says, go to work and call me after you are done with your runs …." Moments later, he changed his testimony, stating he told each "… we are not going to have you come down now. If we need you, I will call you later." Subsequently, he again changed his testimony, stating "I told them to call me after they were done with their runs …." Later in the morning, at approximately 8:30, he again spoke to Pearce, and, "at that time, I think I told her not to come down."

employee told him the above three employees "… were afraid for their jobs and they were getting cold feet." Further, Kelley said "I told them they had to come all the way up through Sunday evening" but not on Monday, and he specifically denied having any conversation with any Employer representative prior to Monday during which he agreed to call witnesses as needed and none would be required to appear before 10:00 a.m.

Generally, in assessing the conduct of representation elections, the paramount concern of the Board has been, and remains, that employees possess full and complete freedom of choice in deciding upon representation by a bargaining representative, and, to ensure that such elections reflect the "uninhibited desires of the employees," it requires that they be conducted in circumstances akin to experimental laboratory conditions. *Kalin Construction Co.*, 321 NLRB 649, 651 (1996); *General Shoe Corp.*, 77 NLRB 124, 127 (1948). In this regard, the Board has long held that the requisite laboratory conditions begin with the filing of the petition and that the critical period, during which pre-election conduct will be examined, commences at that time. *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545, 549 (2002); *Goodyear Tire & Rubber Co.*, 138 NLRB 453, 455 (1962); *Ideal Electric Co.*, 134 NNLRB 1275 (1961). Of course, during its long history, the Board has exhaustively examined whether various types of alleged misconduct, by a party, have destroyed the required laboratory conditions for the conduct of representation elections and has determined that in cases, such as herein, in which no unfair labor practices are alleged, "the test, an objective one, is whether the conduct of a party to [the] election ha[d] the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Metaldyne Corporation*, 339 NLRB 352 (2003); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). Three factors are pertinent to the foregoing test. First, the burden of proof on parties seeking to have a Board-conducted election set aside is "a heavy one." *Dairyland USA Corporation*, 347 NLRB No, 30 at slip. op. 6 (2006). Next, as a relevant factor, the Board may consider the margin of victory or defeat in determining the impact of asserted misconduct upon employees' freedom of choice and the outcome of an election. *Community Action Commission of Fayette County*, 338 NLRB 664, 667 (2002); *Ameraglass Co.*, 323 NLRB 701, 703 (1997).[11] Finally, dissemination of the alleged misconduct is a necessary factor for setting aside a representation election. "The Board places the burden of proof on the objecting party, and, thus, does not presume dissemination." *Dairyland USA Corporation*, *supra*; *Crown Bolt, Inc.*, 343 NLRB No. 86 (2004).

As to the instant objection, I do not believe Kloster's comments on May 15 constituted misconduct. In this regard, while the respective testimony of the three employees (Martin, Montano, and Pearce) was uncontroverted by Kloster, I place no reliance upon Pearce's version of her alleged conversations with Kloster that morning. Thus, notwithstanding having listened to her testimony and possessing every conceivable reason for corroborating her, Kelley directly contradicted Pearce as to what he told her during their two telephone conversations that morning and Elaine Hancock, who, according to Pearce, listened to her final conversation with Kloster regarding

[11] Herein, there were 95 valid votes counted, and a swing of five votes would have changed the outcome of the election.

having to appear at the hearing, testified but failed to corroborate Pearce. Further, close scrutiny of the respective testimony of Martin and Montano concerning their alleged conversations with Kloster on May 15 discloses that the latter's comments to the two employees were consistent with what Kelley told them earlier that morning. On this point, Kelley informed both employees that their respective testimony was not necessary at the hearing and that, if the Petitioner later required either one to appear and testify, he would telephone her, and, according to Martin and Montano, during her conversation with each one, Kloster, who, by then, was aware of Kelley's decision to release the three employees from their subpoenas, essentially repeated the same information. In these circumstances, I find nothing in Kloster's actions on May 15 which may have interfered with the necessary laboratory conditions prior to the election.

However, Kloster's alleged comments to employees Martin, Montano, and Pearce on the prior Friday are more troubling. Thus, each witness was uncontroverted and credible that, on May 12, Kloster told her to report for work on Monday morning and wait for notification of the need for her to testify rather than immediately honoring her subpoena, and I believe each employee understood Kloster to mean she did not have the Employer's permission to be absent from work in order to testify at the representation hearing. In this regard, I note that the two attorneys, Jensen and Marshall, did not even begin to discuss substantive matters until Saturday at the earliest, and the Petitioner's agent Kelley stated the reason he released the three women from their subpoenas on Monday was their fear of placing their jobs in jeopardy by testifying. Citing to*Tufo Wholesale Dairy*, 320 NLRB 896 (1996), counsel for the Petitioner argues that discouraging employees from honoring subpoenas, which compel appearance at NLRB hearings, violates an important Section 7 right and constitutes a "serious unfair labor practice." While I find merit to counsel's argument, I also agree with counsel for the Employer that the issue herein is not whether Kloster's misconduct was coercive but, rather, whether her misconduct interfered with the necessary laboratory conditions so as to prevent employees from expressing a free choice during the representation election. As to this, while Kloster's misconduct may have interfered with the Board's processes and revealed the Employer's hostility to its employees' statutory rights, I must also consider the matter of dissemination. Bearing in mind the Board's admonition that it is the objecting party's burden of proof to establish dissemination, given her failure to corroborate Pearce, I am not sanguine that Hancock was ever informed about Kloster's Friday comments by Pearce and, assuming Pearce did tell Hancock, counsel for the Petitioner offered no other evidence establishing further dissemination amongst the voting unit employees.[12] In these circumstances, notwithstanding the close margin of the Employer's victory in the election, I find no merit to the Petitioner's objection and shall recommend that it be overruled.

[12] As I refused to permit counsel for the Petitioner to pursue the line of questioning, I reiterate that I will not consider Montano's redirect examination testimony that she informed other employees about Kloster's Friday comments to her.

Objection No. 7-- About June 14, an employer agent Interrogated an employee about her union activities and the agent stated that he believed the employee was the person who started the union activity.

The record establishes that the Employer held three pre-election captive audience meetings, at which attendance was taken, for voting unit employees. Two were held on June 12 at 9:45 a.m. and 12:15 p.m. at the Employer's Everett facility and one was held on June 13 at a church in Everett. John Henderson, a labor relations consultant hired by the Employer to conduct its pre-election campaign, after being introduced as the latter's labor relations consultant by Tostenrude, conducted the meetings. Also, two school bus drivers, Arthur J. Knatt, Jr.[13].and Shirley Anderegg, who are employed by the Employer in Hayward, California, were present at each meeting and introduced to the unit employees by Henderson. Forty-one employees attended the first meeting on June 12; 19 attended the second meeting that day; and 17 employees attended the June 13 meeting. Henderson gave the identical PowerPoint slide presentation at each meeting; read from some of the slides; spoke extemporaneously about others; and answered questions from the assembled employees. Among the subjects, which Henderson discussed, were the mechanics of the Board-conducted representation election, the Teamsters Union constitution, collective bargaining and what it entailed including union security, dues checkoff, and management rights clauses, the mechanics of bargaining, the Teamsters Union's record concerning the number of representation election petitions filed, the number of such elections in which it has been victorious, the number of employees represented by that labor organization, and strikes in which the Teamsters Union has engaged.

[13] Knatt testified that he is a school bus driver for the Employer in Hayward, California; that, until approximately 2003, at which time it was decertified, the Teamsters Union had represented the Employer's bus drivers in that city; that he was not a supporter of the union and had made his views known to management; and that, in the spring, the Employer's general manager in Hayward approached him and asked if he would be willing to travel to Everett, where the Employer's employees there were "… getting ready to form a union," and to give any employees, who asked, his "expertise about the [Petitioner]," including "what happened down here." Knatt further testified that he agreed to go, that the Employer paid his travel to Everett, paid for his hotel there, and, notwithstanding he was on summer break, paid Knatt at his regular wage rate for his time in Everett; and that, besides attending the mandatory meetings, he and Shirley Anderegg walked through the Everett facility, making themselves available for questions. With regard to whether voting unit employees perceived Knatt as the Employer's agent, I note that, in a letter, dated June 13, to its employees, the Employer thanked them for listening to the "… Hayward employees who spent time with us."

A voting unit employee, Marjorie Deborah Broock,[14] testified that she attended the 9:45 a.m. meeting on June 12 in the Employer's garage at its Everett facility; that Henderson introduced Knatt and Anderegg as two school bus drivers from Hayward; and that they sat near Henderson on a stage. According to Broock, the alleged incident, underlying the above objection occurred near the end of the meeting while Henderson was showing a slide, which showed purported statistics regarding strikes in which the Teamsters Union engaged, and discussing the Petitioner's proclivity for strikes. He was saying "… that the Teamsters were very strike happy," asserting that approximately 450,000 Teamsters Union-represented employees had struck the previous year. At that point, she raised her hand, accused Henderson of being "a little confused" with his statistics, and asked if he was speaking about one or several companies. Henderson replied that he meant the 295,000 employees of United Parcel Service, who were represented by the Teamsters Union. Then, another employee raised her hand and asked how employees elected a contract negotiating committee if the Petitioner won the election. "So, I raised my hand and I said, we could probably do it by mail," and she added that the team is voted upon by the employees and that, since the employees would be off for the summer, the Petitioner could decide how to do the vote. At this point, the Hayward man "jumped up,"and "pointed at me," and "started yelling at me." He said, "… I am going to assume that you are the one that started this union activity and it is people like you that when the Teamsters come in, you vote all your friends in for the negotiating team." Abruptly, Broock testified, "it got real quiet and nobody said anything." School bus driver, Star L. Buck, testified that she also attended the 9:45 a.m. employee meeting on June 12;[15] that she sat one seat from Broock; that Henderson opened the meeting, saying he would speak on behalf of the Employer and introducing the two Hayward drivers; and that the meeting continued with Henderson making a slide presentation and answering questions about the Petitioner. According to her, approximately 45 minutes into the meeting, Henderson began discussing strikes. In the midst of this, Broock raised her hand, "… and he asked if she had a question and she said yes, she did.… She said that she felt that he was wrong in the … quotes that he gave for strikes and that that was not just one company. It was more of a majority of one company than a whole bunch." Then, "she sat back down." Then, "somebody had another question about how would we get our negotiating team in there if we [were] to vote the [Petitioner] in and … Debbie raised her hand …" and "said that what we would do is that … as a group [we] would negotiate who would be on our negotiating team." At that point, the man from Hayward "… stood up … pointed to her and said, I would assume that …. you are the one who started all of this with the {Petitioner] …. She said, no, and he said, well, you would bring in all of your friends to do the negotiating team and she said, no, that is not true."[16] According to Buck, approximately five minutes

[14] At the time of the meeting, Broock was on medical leave due to a broken leg.

[15] She recalled parking her bus and clocking off on her paperwork at 9:25 and arriving at the meeting room at approximately 9:40 a.m. Also, rather than being on a stage, she recalled the two Hayward drivers sitting at the front of the room and Henderson sitting at a desk with his computer.

[16] As to whether Knatt pointed directly at Broock, Buck contradicted herself, later stating, "He just pointed. I do not know if he pointed directly at her but he pointed …" in her direction.

later, she raised her hand, asked if they were through, and then left to take her son to daycare.

There is no dispute that such an incident, involving the Hayward school bus driver Knatt, occurred; however, the Employer initially offered into evidence the attendance sheets for the three meetings, which establish that, rather than the 9:45 meeting, the two drivers actually attended the 12:15 meeting on June 12. Debra G. Castruita-Marin, a dispatcher/driver[17] for the Employer, testified that she was at the 12:15 p.m., meeting and observed Broock and Buck also sitting in chairs at the meeting. With regard to the alleged incident, she recalled that someone asked a question about who would be on the Petitioner's bargaining committee if the latter was voted in and Broock raised her hand and said something;[18] that "John" answered and then Arthur, the bus driver from Hayward, talked about what happened down there when their committee was selected. While denying that Knatt stood and pointed a finger at Broock, she could not recall whether he said he assumed Broock was the individual who had started the union activities. However, she did recall Knatt saying "… they formed their own committee and he was left out of the loop with some others. And so he really didn't know what was going on during the negotiations … because … he was non-union."

Arthur Knatt testified that an employee asked who would be on the Petitioner's negotiating team if it was voted in and that another employee "… said something like we as a union … the drivers, we're the union. We represent the union." Henderson began to reply, noticed Knatt raising his hand, and told him to go ahead and speak. According to Knatt, "So I stood up and I was addressing my question to the young lady who said … about the union …. I said, 'Well, I don't know if you're the one that started the union, but I'll tell you about the one that started the union down in Hayward, what she did.' And she said, 'Well, what did she do?' And I said that they had their people in place, they had the union stewards all set up, the committee set up. We weren't informed. I didn't even know we had any union formed until word of mouth came down the pike that they were forming a union, and they had all their people in place. And this is what I told the young lady who said that. And I said that that's what happened. And after we found that out, we were out of the loop because they knew where I stood as for the union…. So none of the people that they knew were against the union were on that committee. Only the people that were for the union was on that committee." Knatt denied deliberately pointing at the woman but conceded gesturing with his hands while he spoke. Finally, he specifically denied what was attributed to him by Broock and Buck.

John Henderson essentially corroborated Knatt. According to him, during the afternoon meeting on June 12, an employee asked how it is determined who is on the Petitioner's bargaining committee. Knatt asked to reply and explained, in Hayward, "… the person that had started the union organizing campaign and brought the union in ended up being on the bargaining committee with their friends who also were supportive of the union." At that point, Debbie Broock said, in Everett, "… we will have the power

[17] Castruita-Marin, who voted a challenged ballot during the election, spends most of her working time performing dispatching duties.

[18] Castruida-Marin could not recall what Broock said.

to tell the union what it is that we want in negotiations and what we're going to agree to. Arthur then … said, 'I don't know whether you started the union here, but I know that down in Hayward, the person that started the union organizing drive ended up on the negotiating committee with their friends, and they were the ones in control and the rest of us were left out of the loop." While denying that Knatt pointed at Broock, he also conceded that Knatt gestured with his hands while speaking.

I credit Knatt's version of what occurred toward the end of the afternoon mandatory employee meeting on June 12. His demeanor, while testifying, was that of an honest witness and one with a clear memory of the incident. In contrast, neither Broock nor Buck impressed me as being particularly candid. Further, each was contradicted by the Employer's attendance records as to the meeting which they attended; Buck was internally inconsistent and contradicted Broock, conceding that Knatt may not have pointed directly at Broock; and Buck failed to corroborate Broock with regard to the latter's dubious assertion that Knatt yelled at her. Further, contradicting Broock, Buck depicted her answering Knatt but failed to mention Knatt's asserted "people like you" comment. In short, rather than commencing his response to Broock's comment with "I am going to assume that you are the one that started this union activity …," I find that Knatt actually said "'Well, I don't know if you're the one that started the union …." Assuming that Arthur Knatt acted as the Employer's agent while, on the Employer's behalf, speaking to employees on June 12 and 13, and I believe the record establishes that he was, at least, clocked with apparent authority, the issue is whether Knatt's comment falls within the concept of statements, which beg a response, so as to constitute coercive interrogation. *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002); *Continental Bus System*, 229 NLRB 1262, 1264-65 (1977). While a close question, I do not believe that Knatt's comment can be construed as a question to which he sought a response. Rather, I believe his comment was merely in the nature of an introductory statement to the point he was about to make-- that, in Hayward, California, the employees, who were the main supporters of the union, monopolized positions on the employees' negotiating team, and I think the listening employees understood it as such. Accordingly, I do not believe Knatt's comment interfered with the outcome of the representation election, and I find no merit to this objection and shall recommend that it be overruled.

Objections Nos. 8 and 9-- At pre-election meetings called by the Employer, its agent told unit employees that, if they voted for the Petitioner, they would not receive the following year's cost of living increase, which they customarily received, and that, if they voted for the Petitioner, they would lose their current benefits and/or that bargaining would start from scratch

Clearly, whether, in September 2006, they would continue to receive their annual cost-of-living increase and other benefits if they selected the Petitioner as their collective-bargaining representative was of importunate concern to the voting unit employees, who attended the captive audience meetings, which were conducted by John Henderson on June 12 and 13, and I believe that, when he raised these matters during his slide presentation and when questioned on them, rather than assuaging their fears, he exacerbated them. The issue is whether, in doing so, he destroyed the requisite laboratory conditions so as to have interfered with the results of the pending

representation election. Thus, employee Laura Montano attended the 9:45 a.m. mandatory employee meeting on June 12, which was held in the mechanic's garage at the Employer's Everett facility and testified that the subject of their annual cost-of-living increase was raised and discussed. In this regard, according to several voting unit employees, none of whom was controverted by any witness called by the Employer, in August of each year at the annual "in service" meeting,[19] the latter customarily announces a cost-of-living increase for the school bus drivers, and said raise, always a percentage increase, is implemented after Labor Day at the start of the school year. According to Montano, at the above-scheduled meeting, while John Henderson was in the midst of his slide presentation to the gathered employees, "a fellow employee asked if the union won, if we were going to receive our annual cost-of-living and [Mr. Henderson] said …. That everything could be put on the table and that would be negotiated." Another employee, Alena Moran-Montano likewise testified that, while she could not recall what Henderson was speaking about at the time, employee Julie Merindorf raised her hand and asked he meant that employees wouldn't receive their yearly regularly scheduled raise if the Petitioner was voted in, and Henderson "… answered no, you wouldn't." The employees' annual cost-of-living increase also was discussed during the June 13 mandatory employee meeting at a church in Everett. According to employee Reva Miller, who testified that, during the meeting, Henderson told the employees everything they currently had goes on the table, the subject of the cost-of-living adjustment arose after Henderson projected a slide regarding rates of pay. He said "… that sometimes pay … goes up, sometimes it stays the same, and sometimes it goes down and … most often it will go down if a union is voted in." While Miller failed to testify as to what Henderson specifically said about the raise, employee Elaine Hancock, who also attended the meeting at the church, testified that, while she could not recall exact words, approximately 20 minutes into the meeting, "one of … the new employees … asked Mr. Henderson if she would be getting her raise and he replied, no, and then one of the other employees, I believe Reva, said but that is an annual thing … every September, and his response was, oh, then I don't know." During cross-examination, Hancock recalled that, prior to the new employee's question, Henderson "… was discussing how, if the union passed … everything froze…. We wouldn't get our pay raise." At this point, after conceding she could not recall Henderson's exact words, she recalled him saying "… everything stopped right there," and it was after Henderson answered in this manner that Miller asked her question.

Testifying on behalf of the Employer, employee Pamela Hendrickson testified that, while she attended the 9:45 a.m. meeting on June 12, she could not recall a question from another employee regarding whether the employees would continue to receive their annual September raise Also testifying on behalf of the Employer was employee John Sexton, who was present at the June 13 mandatory meeting at the church and stated that the other employees' questions of Henderson demonstrated that

[19] Said meeting is the annual "mandatory state meeting" at which the Employer informs its bus driver employees of the various State of Washington rules and regulations, which apply to school bus drivers. Said meeting is always held on or about August 31 prior to the traditional start of the public school year immediately after Labor Day.

they were "… angry and sometimes they wouldn't give him a chance to answer" and that "… a lot of them went there with an agenda …."[20] Asked if he recalled any questions, from employees about whether they would get a raise, he replied that he recalled the question being asked; however, asked by me if he recalled Henderson's response, Sexton replied, "No, I don't. I don't know if they even gave him a chance to answer."

Contrary to Hendrickson, who could not recall a question about the employees' annual raise on June 12, or Sexton, who recalled the question on June 13 but believed Henderson was unable to answer, the latter testified that, on June 12, he recalled a question being asked about the employees receiving their annual raise. According to Henderson,[21] who admitted telling the assembled employees that all of their existing wages and benefits would be on the table, "we were talking about collective bargaining, and, when an employee asked … will we get our raise next September. And I responded that if the Union were to win the election and become their representative, no one can predict whether or not you will get that raise because if the Union becomes your representative, all wages, hours, and working conditions become subject to collective bargaining and nobody can predict what the outcome … would be." Further, he specifically denied answering, no, to the question. Regarding his alleged comments during the meeting on June 13 about the employees' September raise, Henderson testified, "An employee asked a question … whether or not she was going to get her raise. And she explained that she was a new employee and that, after a year, employees were entitled to a raise …. I responded to her that nobody would know whether she would get that raise because all wages, hours, and working conditions would be subject to collective bargaining, and nobody can predict what the outcome … would be. And … I said she could end up with more, the same, or less than she has now." At that point, according to Henderson, Reva Miller asked specifically about the September raise, "and I responded in the same manner, that nobody can predict whether or not you were going to get that raise or how much it would be because all wages would go on the negotiating table and are subject to collective bargaining …." Finally, Henderson denied that, in the context of his answer, he said if the employees vote in the Union it often goes down."

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[20] Sexton, who believed Henderson was "fair" and "… actually representing the [Petitioner]," characterized the other employees' questions as "… kind of blah, blah, blah, blah, blah …."

[21] During cross-examination, asked by counsel for the Petitioner if his job was to convince the employees to vote no, Henderson, who had been a practicing labor attorney before becoming a consultant, replied, "My job was to try to persuade them, yes, that they should vote no in the election." Then, asked if his presentation was about persuading the employees, he answered, "Absolutely." But, when asked next, regardless of his words, was it his intent to leave the employees with the impression that voting in the Petitioner would leave their existing benefits at risk, Henderson vehemently replied, "Absolutely not."

Turning to Henderson's alleged comments, during the three mandatory employee meetings, regarding the continuation of the employees' existing benefits if they voted in favor of representation by the Petitioner, Laura Montano testified that, during the June 12 morning employee meeting, the Employer's labor relations consultant projected a slide, which listed the employees' current benefits including turkeys, a perfect attendance luncheon, and others, and "he said that all of those things would be put on the negotiation table." Alena Moran-Montano also was at this meeting, and "I remember the slide of the benefits being shown … showing all the things that we currently have, and … I remember Mr. Henderson saying that, if the [Petitioner] was voted in … these things … would all start-- we would all start from scratch." During cross-examination, Moran-Montano recalled Henderson speaking about collective bargaining, and saying "… you could wind up with the same, more, or less clumped into one sentence" and "… that there was [sic] no guarantees either way …" and "… that everything started from zero." Also, asked what he said about the employees' benefits, Moran-Montano changed her testimony and recalled Henderson saying "… that if the union was voted in, those things we go to zero, new …." Asked by me exactly what words he used, the witness said, "Well, I know he said new. I recall both is what I recall." Told that she used the word scratch during her direct examination, Moran-Montano replied, "I definitely remember new," and "he said scratch or zero. I'm not sure. They were both in there, the zero and the other one …." Reva Miller, who attended the June 13 meeting at the church in Everett, testified that the employees' existing benefits were discussed; that she asked, if employees voted in the Petitioner, would they have "stuff" taken from them; and that Henderson "… said everything starts new at the negotiation table."[22] Elaine Hancock also recalled that the employees' benefits were discussed and that "… there was a discussion going on whether or not we would [keep] our benefits or if everything would just go away and Mr. Henderson said everything … that we had would start new …. It would be on the table and it would start new." During cross-examination, Hancock recalled that Henderson spoke about collective bargaining, stating that the parties had to bargain in good faith but were under no obligation to agree and that, through bargaining, the employees might ultimately receive more, less, or the same. Testifying on behalf of the Employer, Pamela Hendrickson, who attended the June 12 morning meeting, corroborated Moran Montano that Henderson spoke about collective bargaining and said "everything is on the table to begin with, and it's negotiated from like zero up." Asked by me whether Henderson actually used the word zero, she initially answered "yes" but immediately reconsidered, asking "Oh, did he?" and saying "No, I'm sorry. No, he did not." John Sexton recalled that Henderson discussed collective bargaining at the June 13 employee meeting and said "… everything was on the table …. He said everything is negotiable." He also recalled Henderson showing a slide concerning what could happen to employees' benefits during negotiations and saying "… that your benefits can go up, your benefits can go down, or your benefits can stay the same because once [the Employer and the Petitioner] go into collective bargaining … they have to negotiate." According to Sexton, Henderson continued, saying "everything is on the table" and employees could "lose" or "gain" during the bargaining. Sexton specifically denied that Henderson ever said, if a union comes in, "it" most often

[22] Miller testified that she reported on what Henderson said during the June 13 mandatory meeting to three or four employees, who were not present.

goes down. Likewise, Debra Castruita-Marin, who attended the afternoon meeting on June 12, recalled Henderson speaking about benefits and saying "… you can go up, go down, or stay the same." Finally, John Henderson conceded that, during the meetings, he told the listening employees their present benefits would go on the bargaining table; however, he specifically denied saying that bargaining would start from zero or scratch.

As to what John Henderson told the listening employees during the mandatory meetings held in the mornings of June 12 and 13 concerning their expected September wage increase and the viability of their existing benefits if the Petitioner won the representation election, initially, without regard to credibility, it is necessary to determine on what points the witnesses are in agreement as to facts. Thus, witnesses, who testified on behalf of the Petitioner (Alena Moran-Montano and Elaine Hancock) and who testified on behalf of the Employer (John Sexton and Henderson) agreed that the Employer's labor relations consultant spoke at length about collective bargaining and emphasized, in the words of Moran-Montano, that there were "no guarantees" and "… you could wind up with the same, more, or less …" and, in the words of Hancock, that the parties were obligated to bargain in good faith but were under no compunction to agree, and that, through bargaining, the employees ultimately may receive more, less, or the same. Further, with regard to whether the voting unit employees would receive their annual September cost-of-living increase if they selected the Petitioner as their collective-bargaining representative, Laura Montano recalled Henderson saying at the June 12 morning meeting "… everything could be put on the table and that would be negotiated," and Reva Miller remembered, at the June 13 mandatory employee meeting, Henderson telling the listening employees that their existing wages and benefits would go on the table. Concerning both accounts, Henderson conceded responding to a question on June 12, saying "… if the Union becomes your representative, all wages, hours, and working conditions become subject to collective bargaining …" and responding to Reva Miller's question on June 13, saying "… all wages would go on the negotiating table and are subject to collective bargaining." Moreover, concerning the viability of the employees' existing benefits if the Petitioner won the election, according to Montano and Moran-Montano, at the June 12 morning employee meeting, Henderson projected a slide, which listed each of the voting unit employees' existing benefits, and told the assembled employees that each benefit "… would be put on the negotiation table" and that, once collective bargaining commenced, "… everything ….would start new" from "zero." As to the latter alleged comment, before realizing the import of her testimony, Pamela Hendrickson inadvertently corroborated Moran-Montano, stating that Henderson did say "… everything is on the table to begin with, and it's negotiated from like zero up."

Despite my admonitions during the hearing, there are patent contradictions between the witnesses, who testified on behalf of the Petitioner, and the witnesses, who testified on behalf of the Employer. With regard to the former (Montano, Moran-Montano, Miller, and Hancock), I found the demeanor of each, while testifying, to have been that of a veracious witness, one who candidly attempted to recall what she heard Henderson tell the assembled employees.[23] In contrast, Henderson's demeanor, while

[23] Nevertheless, I can not disregard discrepancies in their respective testimony.
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testifying, was that of a duplicitous witness. In particular, I found utterly disingenuous his indignant denial that his intent was to leave the voting unit employees, to whom he spoke at the three mandatory meetings, with the belief their employment benefits would be at risk if they selected the Petitioner as their collective-bargaining representative. Next, I was not impressed with the candor of either Hendrickson or Sexton. The former appeared to have attempted to tailor her testimony in order to bolster the Employer's legal position, and, in support, I point to her transparent change of testimony regarding Henderson's use of the phrase "… it's negotiated from like zero up." Sexton impressed me as being biased in favor of his employer, and, as to this, I point out his fawning characterization of Henderson and disdainful characterization of the questions asked by supporters of the Petitioner. Accordingly, besides the points of agreement, which I have set forth above, inasmuch as Henderson and Hancock agree that such an exchange occurred and as the latter impressed me as being a significantly more straightforward witness, I credit her and find that, approximately 20 minutes into the June 13 mandatory employee meeting, Henderson mentioned the employees' annual September cost-of-living raise and said something like, if they voted for the Petitioner, everything "froze" or "stopped right there." This comment prompted a new employee to ask whether or not she would be receiving her raise, and he replied "… no, and then … Reva said but that is an annual thing … every September and his response was, oh, I don't know." Also, crediting the respective corroborative testimony of Miller and Hancock rather than the distorted testimony of Sexton, I find that, during the June 13 meeting, as he had done the previous day, Henderson discussed the employees' existing benefits and said "… everything starts new at the negotiation table."

With regard to whether his comments on either day destroyed the requisite laboratory conditions and interfered with the outcome of the representation election, on June 12, commenting on the employees' annual September cost-of-living raise, Henderson said that everything would be on the bargaining table and negotiated, and, as to the continuation of their existing benefits, said that bargaining would start new, from "zero." The Board has long held that phrases, such as used by Henderson, are "'dangerous'" and carry with them "'the seed of a threat that the employer will become punitively intransigent in the event the union wins the election.'" *Federated Logistics and Operations*, 340 NLRB 255 (2003); *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977). However, such statements are not per se unlawful. Thus, "… the Board will examine them, in context, to determine whether they 'effectively threaten employees

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For example, at the June 12 meeting, regarding what Henderson allegedly said in response to an employee's question, whether the employees would receive the September cost-of-living increase, Montano recalled him saying it would be "put on the table and … negotiated" and Moran-Montano recalled him replying "no, you wouldn't" receive it. Given Reva Miller's corroborative testimony as to what Henderson said the next day on the subject of wages and benefits and the latter's cognate admission, I do not rely upon the testimony of Moran-Montano. Also, I can not credit Reva Miller's testimony that, while speaking about employees' "pay" at the June 13 meeting, Henderson allegedly said "… most often it will go down if a union is voted in." Elaine Hancock, whose version of what Henderson said, for reasons I will discuss ***infra***, I shall credit, testified as to the same exchange but failed to mention such a comment.

with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore ….'" *Federated Logistics and Operations*, *supra*; *Earthgrains Co.*, 336 NLRB 1119, 1120 (2001); *Plastronics, inc.*, 233 NLRB 155, 156. "On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in benefits will occur only as the result of the normal give and take of negotiations." *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 679 F.2d 900 (9th Cir. 1982). Herein, I have found no Employer misconduct prior to June 12 and, during the meeting that morning, Henderson uttered his above-described remarks in the context of his description of the collective-bargaining process-- that there were no guarantees in bargaining and that employees "could wind up with the same, more, or less."[24] In these circumstances, I think, he made it clear to the listening employees that possible loss of their expected cost-of-living raise or of any other benefits would be as a result of the rigors of collective bargaining rather than retaliation resulting from their support for the Petitioner, and, therefore, I can not find that he engaged in misconduct that day sufficient to have interfered with the result of the June 16 election.

I am not so sanguine regarding Henderson's alleged misconduct on June 13. Thus, I have found that, at the captive audience meeting that morning, referring to the employees' expected September cost-of-living increase, the Employer's labor relations consultant said, if the Petitioner won the election, "everything froze," then answered "no" to a new employee's question as to whether she would receive her raise, and, after Riva Miller told him the cost-of-living raise was an annual one, cryptically replied "… oh, then I don't know." Then, referring to the continuation of the employees' existing benefits, Henderson warned that "… everything starts new at the negotiation table." With regard to his comments about the voting unit employees' annual cost-of-living raise, there is no dispute that, in fact, the employees do receive such an adjustment to their wages at the start of each new school year. It is settled Board law that periodic wage increases become conditions of employment if they are an established practice, regularly expected by employees, and, following an election, in which employees have selected a labor organization as their bargaining representative, an employer may not unilaterally discontinue such a practice. *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003). Further, an employer, which has a past practice of granting periodic wage increases, acts in violation of Section 8(a)(1) and (5) of the Act by announcing that no wage increases will be granted until a collective-bargaining agreement is reached, *Id*.; *IlianaTransit Warehouse Corp.*, 323 NLRB 111, 113-114 (1997). Based upon the foregoing, while, of course, the Employer's voting unit employees were not represented by any labor organization when Henderson made his comments, his statement ("everything froze") and negative responses to questions were patently incorrect, and, I believe, as a labor attorney, he was well aware what he said was wrong and calculated as a threat to the listening employees that, if they selected the Petitioner as their bargaining representative, "…the [E]mployer intends to unilaterally take away benefits and require the [Petitioner] to negotiate to get them back." *Jensen Enterprises, Inc.*, *supra*.[25]

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[24] In commenting on this statement, which most witnesses recalled Henderson using, the Board has noted its ambiguity. *Aqua Cool*, 332 NLRB 95 (2000).

[25] In my view, his "Oh, then I don't know" response to Reva Miller was particularly

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Viewed in the above-described context, Henderson's comment, regarding the continuation of the employees' existing benefits if they selected the Petitioner as their bargaining representative, that everything would start new at the bargaining table, also was, in my view, a meretricious threat, designed to leave the employees with the impression that, if the Petitioner won the election, whatever benefits they receive will be only what the Petitioner is able to induce the Employer to restore. *Earthgrains Co.*, *supra*; *Advo System, Inc.*, 297 NLRB 926, 926 at n. 3 (1990). Moreover, I do not believe that Henderson's warnings were saved by his description of collective bargaining. Thus, while Henderson may have informed the listening employees that, through bargaining, they could receive more, less, or the same benefits, in the circumstances of his above-described threats, his otherwise ambiguous comment, that bargaining would start "new", could "… reasonably be understood to mean that [benefits] would revert to a minimum at least until negotiations were concluded and then could be raised, lowered, or remain the same." *Aqua Cool*, *supra*, at 96. Noting the close proximity of Henderson's threats to the election and the close result of the election and given their coercive nature, I believe that John Henderson's fulminations, regarding continued receipt of their annual September cost-of-living adjustment and continuation of their benefits if they selected the Petitioner as their bargaining representative, to the assembled employees on June 13, clearly destroyed the laboratory conditions necessary for the June 16 election and, given the number of employees, who heard Henderson's warnings, probably did have an affect upon the result of the said representation election. Accordingly, I find merit to the Petitioner's Objection Nos. 8 and 9.

Objection No. 10-- At pre-election meetings, called by the Employer the latter's agents threatened that the Employer could no longer discuss employee requests or needs with employees without the Union being present if the employees voted for the Union

The crux of this objection is a verbal exchange between employees and John Henderson during the mandatory employee meeting on June 13 held at a church in Everett. While she could not recall the context of his remark, Reva Miller recalled Henderson saying "… if we voted in a union, we, as individuals, could not go into our manager's office and discuss things with our manager without a union rep with us."[26] Immediately, another employee asked whether he meant employees could no longer go into their manager's office and ask for a day off without a union representative, and Henderson replied "… well, I suppose you could do that, but let's say your manager wanted to give you the day off but not charge you for it. Then, that would mean he would have to do it for everyone." Elaine Hancock likewise believed Henderson "… must have been talking about … if the union was voted in and we wanted to talk to our boss about something, we could not do it unless there was a union rep with us."[27]

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disingenuous.

[26] Miller stated that she remembered this comment because "I wrote it down at the meeting."

[27] At one point during cross-examination, she agreed that she asked her question after Henderson spoke about employees being represented by union representatives

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However, according to her, "I was listening to Mr. Henderson and I raised my hand and asked … do you mean to tell us that if I went in to Stacy or Kirk's office and asked them for a day off, they could not talk to me … that we would have to have a union representative with us and he said that this was true, and I said that I didn't believe him. And then I got angry and left."

John Sexton and John Henderson had different recollections about the incident. Asked if there was any discussion about employees being able to go directly to Kirk or Stacy, Sexton was able to "vaguely" recall Henderson saying "… that anybody can talk to the company any time they want but … if there's a union involved, they can have their union representation." Also, he recalled Hancock asking Henderson something like, do you mean to tell me that I can't go into the supervisor by myself if the union comes in. Henderson recalled the exchange, testifying it occurred while he was discussing grievances and the Teamsters Union's constitution, which gives the labor organization final authority to process and present grievances, including the right to settle them on terms advantageous to it rather than its members. An employee then asked a question ("… do you mean to tell me that if we have a union, I can no longer go directly to Stacy or Kirk and ask a question?"), and, during the ensuing discussion, he told the employees that they can continue to go their manager with personal problems or questions but that managers can not deal directly with the employees if the subject concerns wages, hours, or working conditions. At that point, according to Henderson, Reva Miller asked if he meant she could no longer go to Stacy and ask for a day off, "and I explained you can certainly go ask her for the day off but whether or not she could give you the day off would depend then on what it said in your union contract." He explained that giving an employee a day off might violate the seniority provision of the contract, that the manager could not do that, and that, in such a situation, the employee might have to go the union in order to ascertain "… if it were to be an exception to the union contract."

At the outset, except for admissions and where corroborative of more honest witnesses, I do not rely upon the testimony of either Sexton or Henderson with regard to the instant objection. Bluntly put, assessing the demeanor while testifying of each, neither impressed me as being candid, and I believe both dissembled in order to protect the Employer's legal positions herein. On the other hand, as I stated above, Miller and Hancock appeared to be frank witnesses, attempting to recall what occurred in a candid manner. The latter two witnesses corroborated each other, and I find, that, at one point during the June 13 meeting, Henderson told the assembled employees, if they selected the Petitioner as their bargaining representative, they would no longer be able to go to their managers with personal problems unless accompanied by a representative of the Petitioner, and that, corroborated, by Sexton,[28] Hancock asked Henderson if he meant employees could no longer ask the managers for a day off unless accompanied by a

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during investigatory interviews. However, "I don't believe he brought it across as a right," and "he led me to believe that I could not speak to the company about a problem unless I had a union representative with me."

[28] Recalling the exact question, Miller was unable to recall the identity of the questioner.

representative of the Petitioner. Finally, relying upon Miller,[29] essentially corroborated by Henderson, I further find that the latter replied, "… well, I suppose you could do that, but let's say your manager wanted to give you the day off but not charge you for it. Then, that would mean he would have to do it for everyone."

Without citation, counsel for the Petitioner asserts that informing employees that, if they selected the Petitioner's representation, they could no longer address even their minor day-to-day concerns with management without having a representative of the Petitioner present, is "objectionable and an unfair labor practice." Counsel is correct that Henderson's original comment and his explanatory response to Hancock clearly were meant to convey to the listening employees that their access to their managers would change if they selected the Petitioner as their bargaining representative. However, contrary to counsel, I believe that Henderson's statements were neither coercive nor disruptive of the laboratory conditions so as to have possibly affected the results of the representation election. In this regard, "the Board has long held that there is no threat, either explicit or implicit, in a statement that explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before. Section 9(a) contemplates a change in the manner in which employer and employees deal with each other, and an employer's reference to this change cannot be characterized as a retaliatory threat to deprive employees of their rights." *Office Depot*, 330 NLRB 640, 642 (2000). In *Office Depot*, the Board concluded that telling employees, if a union comes in they would no longer be able to communicate with management in the same way, did not violate Section 8(a)(1) of the Act. Likewise, in *John W. Galbreath & Co.*, 288 NLRB 876, 876-877 (1988) and *Tri-Cast, Inc.*, 274 NLRB 377 (1985), the Board concluded that similar statements such as,"'you have lost the ability to speak for yourself'" and "'we have been able to work on an informal and person-to-person basis. If the union comes in, this will change,'" during an election campaign, "… cannot be characterized as … objectionable retaliatory threat[s] to deprive employees of their rights, but rather [are] nothing more or less than permissible campaign conduct." In this regard, statements, such as made by Henderson, "… simply explain that the relationship between the employer and the employees will change in the event that the employees select a statutory bargaining representative …." *John W. Galbreath & Co.*, *supra*, at 876. Accordingly, I find no merit to this objection and shall recommend that it be dismissed.

[29] I acknowledge that Hancock and Miller disagree as to Henderson's response to the former's question. In choosing not to rely upon Hancock, who, at all times, impressed me as being an honest witness, I note that it is not unusual to believe some, but not all, of a witness's testimony.

Objection No. 12-- Approximately one day before the election, the Employer announced a pay raise of $1.00 per hour for the next school year. Such pay raise and the announcement thereof [were] for the purpose of coercing employees from voting for the Petitioner. That pay raise was not in keeping with the Employer's past practice in that it was announced much earlier than was the Employer's historical practice and in that it was much larger in amount than was consistent with the Employer's historical practice.

As stated above, the Employer's past practice had been to annually grant to its voting unit employees a percentage cost-of-living adjustment, never amounting to more than approximately 60 cents per hour, each September at the start of the new school year. The Employer announced these wage increases at its in-service meeting held in the last week of August. The crux of the instant objection is the Employer's distribution of Petitioner's Exhibit No. 2, a flyer with the words, "Important news … Durham drivers to be among highest paid in county," in boldface and capital letters at the top, to all voting unit employees one or two days prior to the June 16 representation election. In said document, the Employer announced a $1.00 per hour across-the-board pay raise, in effect a 6.9 percent wage increase, effective in September 2006, for its Everett bus drivers.

The record establishes that the Employer's existing five-year contract with the School District[30] provides for a minimum hourly wage rate for school bus drivers of $11.50 per hour[31] and that driver wage rates are contained in yearly contract amendments, which contain the adjusted contract prices for the successive school years. Said amendments are negotiated by the Employer and the School District usually in July; the Employer submits to the School District a spreadsheet, which contains the Employer's proposed price increase for the next school year, including a percentage increase in bus driver compensation, and its justification for any price increase, and the parties negotiate from that figure. With regard to bus driver compensation and the contract price for a school year, Robert Collard, the School District's associate superintendent for finance and operations, testified that "… it is important to differentiate pricing from wages because we don't negotiate what the wages will be, just what the price will be that Durham will charge us on a per trip basis and for specialized trips … and that really is the extent of our discussion on compensation." He added that "we care … about what the Employer is paying … the drivers to make sure that they are competitive with other districts around us … but what that wage rate is, we do not get involved in that." With regard to the school bus drivers' wage rates, asked specifically if

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[30] At various points in his post-hearing brief, counsel for the Petitioner asserts that, other than Everett, no other surrounding school districts subcontract out school bus services. He cites to the following exchange between himself and Charles Moore

Q. Are you the only bus service up there for school children that's contracted out Versus done by the school districts?

A. In Everett, yes.

Unlike counsel, I find this exchange too ambiguous to draw the same conclusion.

[31] This amount was the minimum wage rate for the 2002-2003 school years, and the contract contains no other minimum rate.

the School District 's primary concern is that they be competitive, Collard replied, "Our primary concern is making sure there are drivers present to do the service, to pick up the kids and take them places." According to Collard, in order to ensure that the Employer always has an ample complement of drivers to provide the required school bus services, the transportation supervisor for the School District annually conducts a wage survey of the bus driver wage rates in surrounding school districts, and said survey results are passed along to the Employer for the latter to study in order to attract enough drivers to provide the required services.

The record further discloses that the Employer's contract with the School District ends after the 2006-2007 school year. As to this, Collard testified that, in April or May, 2006, the school district solicited bids for the next school bus contract, which would run from 2007 through 2012, and "… we expected other companies to bid, and, at the pre-bid conference, we had … two companies present. We had Durham and we had Laidlaw…. We take the bids … and there is two parts of a bid. There is a technical bid … and … there is a cost proposal…. Once … the school board makes a decision to accept a bid, it includes the whole package. It is the technical proposal and the cost proposal that establishes a baseline and it is used. Keep in mind, this is a year away from the effective date … and there is a provision in the contract allowing an adjustment to the price …." He added that the "… request for proposals we put out this past spring was for a five-year contract commencing in September, 2007" and that whatever price the Employer established for its new contract proposal "… would not directly effect " what it would propose as the contract price for the 2006-2997 school year as the Employer would have known that figure until it finished negotiating with the School District in July 2006. However, during cross-examination, Collard conceded that "when Durham submitted their bid … for … 2007 … they submitted a price proposal based on their current … situation," and, therefore, the Employer's current cost projection must have been "built in … in order for them to have a baseline price or justification for what their price might be."

Kirk Tostenrude, who became the general manager for the Employer at its Everett, Washington facility on March 20, testified that, upon assuming the position, Charles A. Moore, the Employer's senior vice president for the western area, informed him that the School District had solicited bids for a contract covering school bus services for the 2007 through 2012 school years and that the Laidlaw Co. would be its competitor for the contract. According to him, prior to the deadline for the Employer to submit its bid for the contract, during the week of March 27, he received a telephone call from Terri Debolt, a transportation coordinator for the school district. "She … said that she had done a wage study and was letting us know that our wages were low compared to the districts around us…. She … said that school districts around were at $16.00 and $17.00 and there even a couple of school districts in the #18.00 range."[32] Immediately

[32] The Employer failed to call Debolt as a corroborating witness. However, given that Collard testified that such a wage survey is normally done, based upon a suggestion from me, counsel for the Employer and counsel for the Petitioner had a telephone conference call with Debolt and each asked her questions regarding her alleged telephone conversation with Tostenrude. I suggested to counsel that they

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upon finishing the conversation, he met with Stacy Kloster and "… sat down with her and worked our figures to see how low we actually were and what it would take to bring us up to the amount for our drivers to be competitive in the area. At that time, we came up with $1.00,"[33] Then, he telephoned Charles Moore; informed him that the Employer's wage rates were low; and told him a $1.00 per hour wage rate increase was necessary to be competitive with surrounding school districts. Moore replied that he would think about it because the bid process was about to commence and would let Tostenrude know when he reached a decision.[34] Tostenrude further testified that Moore ultimately made the decision to grant the Employer's voting unit employees the $1.00 per hour wage increase and to specifically include the pay raise in the Employer's bid for the new Everett school bus contract and that Moore made the latter decision "… to let the District know that if they brought a concern to us, we would respond quickly. And so we put it in there to let them know that in bringing it to our attention, we were responding."

The Employer's bid for the Everett school bus contract for 2007 through 2012 was submitted to the School District on April 20. While conceding that the Employer had not yet given the School District it cost projection for the upcoming 2006-2007 school year, Tostenrude testified that the bid "… was based on our projection of the costs at the time.… it's our projected increase over the year." He added that the $1.00 per hour raise was included in the 2007 contract price, "and we told them in the bid packet that it would be starting in 2006" in order to demonstrate "… we were going to take wages to the level to be competitive." Notwithstanding that the Employer made its decision to grant the above-described wage increase prior to May 4, the date upon which the Petitioner filed the instant representation petition, the Employer failed to

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submit a stipulation as to what Debolt's testimony would have been regarding such a conversation. Such a stipulation was submitted to me; however, for some reason, counsel could not agree as to what Debolt told them. However, counsel did stipulate that, had she testified, Debolt would have stated that, in fact, she did conduct an wage survey of what surrounding school districts were paying school bus drivers and mechanics; that her survey consisted of her secretary calling a list of surrounding school districts; that, to the best of her recollection, in the first week of April, she telephoned Tostenrude to inform him of the results of her annual wage survey; that, during their conversation, she told Tostenrude the "bottom line" and "top line" of what the districts were paying school bus drivers; and that she made no recommendation to Tostenrude regarding the Employer's pay rates for drivers.

[33] For the 2005-2006 school year, the Employer was paying first year drivers a wage rate of $12.58 per hour, second year year drivers a wage rate of $13.71 per hour, and third year drivers a wage rate of $15.30 per hour.

The Employer presented no evidence that it was experiencing any difficulty in attracting drivers at the wage rate, which it had in effect at the time.

Tostenrude testified that, at the time of his hire, he "suspected" that union organizing was on-going amongst the Employer's drivers and mechanics in Everett.

[34] Tostenrude testified that he and Moore believed that Laidlaw would be an aggressive bidder for the Everett contract and that the Employer "… needed to do everything in our power … to maintain the contract."

announce the raise to its employees at that time. According to Tostenrude, no announcement was made then "because at the time … the bids are sealed …. we were told that the bids would not be opened until September or October. So we couldn't announce it … because it wasn't public knowledge until June 6th."[35] When I suggested the Employer could have announced and given the increase then, Tostenrude stated, "But we were petitioned by the Union."

Tostenrude identified Employer's Exhibit No. 1 as a document, which came to his attention during the week of June 12, the week of the election. The document is a flyer and bears the heading, in boldface and capitals, "Answers to questions we should ask ourselves." A series of questions follows, the first of which reads, "Will Durham guarantee me raises in writing" and is answered "No." Further, at the bottom of the document is the message, "Durham wants you to be Safe, On time, Union free, **and the lowest paid drivers in the county**." Tostenrude testified that, as he first observed the above document "… hanging over the union items in the area that they were posting documents," he believed it had been published by the Petitioner and that Petitioner's Exhibit No. 2 was the Employer's response to the document, which he believed was not true "because I knew at the time that we were giving the $1.00 increase to our drivers and they would not be the lowest paid drivers in the county."[36] More specifically, he testified, the idea to publish Petitioner's Exhibit No. 2 originated with "my campaign committee," consisting of the Employer's attorney Sharp, Moore, and himself, and it was placed in each voting unit employees' company mail slot one or two days before the election. He added that his campaign committee believed it permissible to announce the raise then inasmuch as the Employer's contract bid had been accepted and the raise "became public knowledge" and "… the employees could find out for themselves …;"

Charles Moore also testified on this subject. According to him, the bid for the 2007 through 2012 Everett School District school bus contract was prepared by his office in Concord, California. According to him, the Employer worked under the assumption that Laidlaw Co. would be a competitive bidder and was concerned because it had recently lost two bus contracts, in Seattle, Washington and Boise, Idaho, to Laidlaw.[37] Then, while he was preparing the bid, Kirk Tostenrude telephoned him,

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[35] As no competitive bid was submitted, the Everett School Board announced that it was awarding the 2007 through 2012 school bus contract to the Employer at its June 6 regularly scheduled meeting.

[36] The Employer's flyer states that "… the Everett school board has awarded us a new five year contract which includes a $1.00 per hour raise starting in September 2006." In this regard, I note that the idea to commence paying the raise, during the 2006-2007 school year, was the Employer's. Further, Robert Collard stated that the above statement "… may or may not be a fact. We would not know that and we would not really be concerned with it … because, again, we do not deal with the wages … for the employees."

[37] Notwithstanding having described the Employer's relationship with the School District as "a very long-standing partnership" and a "very close" one and being aware that cost was merely a factor to be weighed against others, Moore was sufficiently concerned about losing the contract to Laidlaw Co. that he was prepared to submit the

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informing him that the Employer's wage rates in Everett were no longer competitive, and stating that he wanted to ensure the Employer would have enough drivers for the work in Everett.[38] Tostenrude also told him he believed the Employer was "lagging" behind other districts in wages for drivers and "…he felt like if we were going to be competitive … we needed to move our wages up." He then recommended a $1.00 per hour across-the-board wage increase. Asked if he was aware of the union organizing at the Everett facility at the time, Moore replied that, while he was aware of some "disgruntled'" employees, "I'm not sure that I was aware of [the union organizing] at that point in time."

Moore testified that, inasmuch as the bidding process was in the fourth year of the existing contract rather than the last year, "… we knew that we had to make sure that we were doing everything we could in the fifth year of our contract to hopefully make it easier for the [School District] to take our bid and award it to us." Therefore, after performing cost calculations, with regard to what the Employer could afford financially and projected profit margins, and bearing in mind the necessity of providing "good customer service," he decided not only to give the $1.00 raise in the 2006-2007 school year but also to specifically include it in the bid for the new school bus contract. Asked for the connection between the contract bid and the wage increase, which would go into effect prior to the effective date of the new contract, Moore replied, "Because they were actually making that bid decision a year early…. And so we wanted to make sure that when they were making that decision for the next five years …" the School District would know we were performing well in the fifth year. Continuing, Moore stated that, even though bids are not normally accepted until October, they are opened when received, and "we did not want to have a bad taste in the District's mouth as they were making that decision." He explained that this was the reason the Employer did not want to wait until July 2006 to include the raise in the projected costs for operations during the 2006-2007 school year and that the Employer would have accepted a loss in the last year of the existing contract in order to obtain the new one.

Finally, according to Moore, while the Employer has never given its employees at its Everett service center a raise of the magnitude announced prior to the election, it has given such raises elsewhere. Thus, Moore testified that, several years ago, during the rapid expansion of business in "Silicon Valley," the wages, which the Employer paid to its school bus drivers at three different service centers in the San Francisco Bay area, "fell behind," and "… we gave a $1.00 per hour or more in certain locations … to be more competitive with driver wages." Also, in 2005, the Employer gave a $1.00 per hour increase to its bus drivers in Roseburg, Oregon. "It's kind of about the same situation because the customer and my management team there basically agreed that our wages were lagging in the area. And for us to be competitive and … to make sure that we did a good job customer services wise, we agreed to [give the raise] …. And it's kind of the very same thing …. at the time that we made that decision, we also were in the fourth year of a five-year contract." Continuing, Moore testified that remaining competitive is important as "… in the school bus business … about 90 percent of doing

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lowest bid for the contract.

[38] Tostenrude testified that he had no further conversations with Moore regarding the raise. Moore contradicted him, stating "I believe it was more than one."

a good job is having enough school bus drivers. If you don't have enough school bus drivers, it's almost impossible to do a good job …."[39]

Although inartfully worded, it appears that, by its instant objection, the Petitioner is contending that the Employer's decision to grant its Everett, Washington school bus drivers a $1.00 per hour raise, the amount of the raise, and the timing of the Employer's announcement of the raise each independently destroyed the requisite laboratory conditions surrounding the election and constituted an act of misconduct sufficiently serious so as to have affected the outcome of the June 16 representation election. In this regard, in his post-hearing brief, counsel for the Petitioner argues that the Employer must establish the following:

> First, it must prove to the judge's satisfaction that it would have decided upon a pay increase when it did even had there not been an election campaign underway. Next, it must prove that the amount of the raise would have been a $1.00 across the board raise, even though historic raises had not been of that size or of that nature. Third, even assuming that such an unprecedented pay raise was in the offing merely as a business decision totally unrelated to the union campaign, the Employer must prove a legitimate reason to announce the raise prior to the election.

However, contrary to counsel, I do not understand how the Employer's decision to grant the $1.00 per hour across-the-board pay raise may even be considered as possible objectionable misconduct. Thus, reaching a decision to grant a raise is not the same as implementing the decision.[40] Put another way, in the context of objections to the conduct of an election, rather than concentrating upon the underlying or express purpose, the crux of the issue is the impact of the asserted misconduct upon the employees' freedom of choice. *Speco Corp.*, 298 NLRB 439,442 (1990). Moreover, the uncontroverted record evidence is that Charles Moore reached his decision to grant the Employer's $1.00 per hour across-the-board pay raise, which had been recommended by Kirk Tostenrude,[41] prior to submitting the Employer's bid for the 2007 through 2012

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[39] With regard to credibility, Collard, Tostenrude, and Moore were uncontroverted in their respective accounts. While each appeared to be testifying in a straightforward manner, I believe some of the respective testimony of Tostenrude and Moore, particularly with regard to the rationale for the Employer's $1.00 per hour across-the-board pay raise and why the Employer failed to announce the raise in April, defied reality. Accordingly, except where noted, I find as fact most of the above-described testimony.

[40] Counsel for the Petitioner spent many pages of his post-hearing brief attacking the motive underlying the across-the-board raise herein. However, the rationale for the raise is more relevant to an unfair labor practice allegation than an objection to an election. While clearly relevant if the raise is alleged as a violation of Section 8(a)(1) and (3) of the Act, I do not see how motive is relevant in the context of an objection to an election.

[41] I agree with counsel for the Petitioner that Tostenrude's explanation for recommending the pay raise is not trustworthy. In this regard, Tostenrude's testimony,

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school bus contract to the School District. Further, Moore included in the Employer's bid, which was submitted to the School District on April 20, its commitment to make the pay raise effective for the 2006-2007 school year. In these circumstances, as the representation petition herein was filed by the Petitioner on May 4, assuming *arguendo* it may be considered objectionable, it appears that the Employer's decision to grant the pay raise, at issue, occurred outside of the critical period, during which objectionable misconduct must occur.[42] Accordingly, for purposes of the instant objection, I shall concentrate on whether the timing of the announcement of the pay raise and the amount of the raise constituted misconduct sufficient to destroy the laboratory conditions and to have affected the outcome of the election.

The Board utilizes the same standard for determining whether the announcement of a wage increase during the critical period is objectionable conduct as it does for determining whether such conduct constitutes an unfair labor practice. Thus, an employer may not announce a raise in pay in order to discourage union support, and the Board may separately scrutinize the timing of the announcement to determine its legality. *Mercy Hospital*, *supra*, at 545; *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. 23 F.3d 399 (4th Cir. 1994). "The standard for determining whether the timing of [the announcement of a wage increase] during the critical period is unlawful is essentially the same as the standard for determining whether the grant of [the raise] itself violates the Act. Accordingly, '[t]he Board will infer that an announcement or grant of benefits during the critical period is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or bestowal of the [raise].'" *Mercy Hospital*, *supra*; *Star, Inc.*, 337 NLRB 962 at 962 (2002); *Speco Corp.*, *supra*, at 439, n. 2.

With regard to the Employer's announcement of its $1.00 per hour across-the-board raise for voting unit employees in a flyer, which was distributed to said employees one or two days prior to the election, I note, at the outset, that Kirk Tostenrude's explanations for failing to announce the raise, in April, immediately after the Employer's decision to bestow the wage increase, is rather dubitable. While he stated that no announcement could be made until the specifics of the Employer's bid for the 2007 through 2012 school bus contract became public knowledge upon the opening of the bids in September or October and that the Petitioner had recently filed the instant representation petition, the Employer's plan was to make the raise in pay effective for the 2006-2007 school year, therefore, the voting unit employees presumably would have been told about their raise at their August in-service meeting, and the instant petition was not filed with Region 19 until May 4. Nevertheless, I believe that the

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regarding the substance of his telephone conversation with Terri Debolt was not entirely corroborated by the latter and he and Moore were contradictory regarding their conversation or conversations concerning the pay raise. In these circumstances, given Tostenrude's admission he was aware of the union organizing campaign, the Employer's asserted motive for deciding to give the pay raise is questionable.

[42] It is true that, in some instances, the Board may consider pre-petition conduct. However, such conduct must "affect or give meaning to actions taken during the critical period." *National League of Professional Baseball Clubs*, 330 NLRB 670, 676 (2000).

Employer has, in fact, established a legitimate reason for the timing of its announcement of the pay raise. In this regard, I credit Kirk Tostenrude, who was uncontroverted, that his campaign committee decided to announce the pay raise in response to a flyer, which, the Employer reasonably believed, had been published earlier in the week by the Petitioner,[43] stating, among other points, that the Employer would not guarantee a raise in writing and that the voting unit employees were the lowest paid drivers in the county. Counsel for the Employer contends that the Employer had a "lawful right" to respond, and I agree. Thus, he is correct that the Board presumes that, during an election campaign, a party will respond to perceived false or misleading propaganda, published by the opposing party. *Snap-On Tools, Inc.*, 342 NLRB 5, 21 (2004). Moreover, at least one court of appeals has found that, during an election campaign, the parties are lawfully entitled to respond to campaign propaganda, published by the opposing party. *NLRB v. Big Three Industrial Gas & Equipment Co.*, 441 F.2d 774, 775-777 (5th Cir. 1971). In my view, it undoubtedly was the Petitioner, who, in the week of the election, decided to place the Employer's alleged reticence to guarantee, in writing, a raise for its voting unit employees and the status of their wage rates in comparison to those of other school bus drivers in the county at issue, and, in these circumstances, the Employer possessed a statutorily protected right, privileged by Section 8(c) of the Act, to respond to assertions, which, it perceived as being misleading or untrue. Accordingly, I believe that the Employer established a legitimate reason[44] for the timing of its announcement concerning the $1.00 per hour across-the-board raise for voting unit employees.

Finally, counsel for the Petitioner contends that, even if the Employer did not engage in objectionable misconduct by announcing a raise for the voting unit employees, the amount of the raise constitutes election misconduct. In this regard, counsel points out that the instant $1.00 per hour raise has no historical precedent, noting that previous raises for the Everett-based school bus drivers had been percentage increases and that none had increased hourly wage rates more than 60 cents an hour. While it is true that there is no historical precedent for such a raise in Everett, I credit Charles Moore, who was uncontroverted, that there is company-wide precedent for such a raise. Thus, such an increase was given to the Employer's employees in the Silicon Valley area of the San Francisco Bay area a few years ago during an economic boom period in the area. Moreover, in 2005, in circumstances similar to herein, in the final year of a contract in Roseburg, Oregon, the Employer awarded its bus drivers there with an identical $1.00 per hour raise. While counsel for the Petitioner contends that the Employer offered no corroboration for Moore's

[43] Given the location of its posting, an area in which the Petitioner's campaign literature was customarily posted, I believe Tostenrude was entitled to presume the document was published by the Petitioner.

[44] The Employer also contends that publication of its flyer, announcing the $1.00 per hour raise for the voting unit employees, was not objectionable as the Everett School Board had awarded it the 2007 through 2012 school bus contract the previous week, thereby making public the terms of its bid, including the raise. Inasmuch as I have found that the Employer had a legitimate reason for responding to the flyer, I need not rule on the validity of this alternate assertion.

testimony, the latter impressed me as testifying honestly on this point, and I rely upon him. Accordingly, as the Employer established a legitimate reason for the timing of its announcement of the pay raise and as there appears to have been precedent for amount of the raise for the voting unit employees, I shall recommend that this objection be rejected by the Board.

CONCLUSIONS

It is recommended as follows:

Objection No. 3 relates to the Employer's alleged interference with the obligation of voting unit employees to honor subpoenas and testify at a Board-directed representation hearing, As set forth above, while the Employer may have engaged in the alleged misconduct, the Petitioner offered no evidence that said acts were disseminated to other voting unit employees. I therefore recommend that this objection be overruled.

Objection No. 7 concerns an interrogation of an employee by an alleged agent of the Employer concerning her union activities. As set forth above, I do not believe that the alleged agent's statement to the employee was of the type which begs a response; rather, it was in the nature of an introductory comment to the point that the individual was about to make. Accordingly, I recommend that this objection be overruled.

Objection Nos. 8 and 9 concern alleged threats, by the Employer's labor relations consultant, at captive audience meetings that, if employees voted for the Petitioner, they would not receive their annual cost-of-living adjustment and they would lose their current benefits. As set forth above, I found that, with regard to their annual cost-of-living adjustment, by informing listening voting unit employees, if they voted for the Petitioner, "everything froze," by answering "no" to a new employee's question, whether she would receive the September wage adjustment, and by responding to an employee's comment, that the wage increase was given annually, with the statement, "Oh, then I don't know," the labor relations consultant threatened voting unit employees that they would not receive their annual cost-of-living adjustment if they voted for the Petitioner. Also, I found that, with regard to their existing benefits, by informing voting unit employees, if they voted in the Petitioner, everything would start "new" at the bargaining table, the labor relations consultant threatened that they would lose their existing benefits if they voted for the Petitioner. Inasmuch as these acts constitute acts of serious misconduct, as the labor relations consultant's threats were disseminated to a large group of employees and reported to other employees, who were not in attendance at the meeting, as the threats were made in close proximity to the election, and as the results of the election were extremely close, I recommend that these objections be sustained.

Objection No. 10 relates to alleged threats, by the Employer's labor relations consultant, that, if the voting unit employees selected the Petitioner as their bargaining representative, employees could no longer discuss their requests or needs with management representatives unless representatives of the Petitioner were present. As set forth above, I have found that the labor relations consultant did, in fact, make such

statements to employees at a captive audience meeting. However, as such statements merely reflect the change in the relationship between employer and employees after employees select a labor organization as their bargaining representative, they can not be construed as retaliatory threats to deprive employees of their statutory rights. Accordingly, I recommend that this objection be overruled.

Objection No. 12 concerns the Employer's announcement of a raise for voting unit employees one or two days prior to the representation election. As set forth above, I have concluded that the Employer presented evidence of a legitimate reason for the timing of the announcement and that the size of the raise was not unprecedented within the Employer's business operations. Accordingly, I recommend that this objection be overruled.

IT IS FURTHER RECOMMENDED that the results of the June 16 representation election be set aside and that the Regional Director of Region 19 be directed to conduct a second election amongst the Employer's voting unit employees.[45]

Dated: Washington, D.C. December 27, 2006

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Burton Litvack
Administrative Law Judge

[45] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.